Open Source Software

British Computer Society

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Note: These PowerPoint slides are based on UK law as at 10 January 2006

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Overview

- Basics of software licensing
- What is Open Source?

- Key features of Open Source Licences
- Risks of Open Source and how to manage them

- Questions

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The rise of Open Source (“OS”)

- Huge rise in revenue of Linux-based server hardware
- Two thirds of servers run on Apache OS software
- Bristol City Council to save £1m by using StarOffice (April 06)
- Firefox Browser reaches one in ten Internet Users (April 06)
- 90% of enterprises running both Windows and Linux say they spend less effort managing Linux (February 06)

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What is Open Source?

Software Licensing 101

Exam Paper

Question 1 – What is Open Source?

(a) A tale of penguins and gnus
(b) A philosophical crusade
(c) An efficient way to facilitate the development of software
(d) A threat to the domination of Microsoft
(e) A type of software licence
(f) ALL OF THE ABOVE

Open Source and Software Licensing

Software licensing and risk

- IT Managers and lawyers are risk managers
  - Avoiding copyright infringement
  - Not breaching the terms of software licences
- Open Source is a new(ish) area of legal risks for developers and users
- OUT-LAW Survey – 75% of developers “borrow” code from 3rd parties
- Evaluating risks is key to choice between Open Source and proprietary software

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The need for licensing

- IPR in software
  - Copyright
  - Patents
  - Database Rights
- Copyright Infringement
  - copying, using or storing the whole or a substantial part
  - quality, not quantity
- Software licences legitimise acts that would otherwise amount to copyright infringement

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Source Code

- The “crown jewels” of any software house
- Program code which a (skilled) programmer can read
- Key to modifying code to correct errors, add/remove and develop
- Very rarely disclosed to users
  - Source code escrow as a form of insurance

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Proprietary Software Licensing

- Supplier-biased terms
  - Tight licence grant (limited scope of use, number of users etc.)
  - Closed source
  - Licence Fees, royalties, duration and termination
  - Strict limitations on liability

- Customer-biased terms
  - Software warranties
  - IPR Indemnities

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Open Source Licensing

- Free Software Foundation (FSF)
  - *“anyone, anywhere, for any purpose whatsoever, should be ‘free’ to use, copy, modify and distribute (whether by selling or giving away) software”*
- Open Source Initiative (OSI)
  - Open Source Definition – a more “business friendly” approach
  - Based on the Open Source Principles

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Open Source – the developer & business view

- Highly collaborative (chaotic..?) development model
- Rapid evolution of software
- ‘The Cathedral and the Bazaar’

- Cheaper alternative to proprietary software
- Interesting variations of base software – Torpark anonymous browser – version of Firefox
- ‘One in the eye’ for Bill Gates

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Open Source – the legal view

- Just another type of software licence

- Typical features:
  - Full access to source code
  - Right to modify code and to distribute
  - ‘Sharing’ of modified code through the same terms
  - Little warranty protection
  - Licence often at no charge (but often with support charge)

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Open Source is not…

- *"Public Domain"*
  - IPR in work has lapsed or been dedicated to the public
- *"Freeware" or "Shareware"*
  - distributed in binary form only
- *"Open Standards"*
  - refers to the standards creation process, not a license
- *"Contrary to copyright law"*

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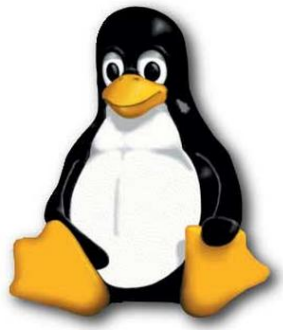
A bit of perspective - and the Penguin

- Why the hype?
- LINUX – and Linus Torvalds
- Derivatives a-plenty, e.g. Red Hat



- Linux is far and away the most widely used OSS

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Features and risks of Open Source licences

Peter Vass

Standard form OS Licences

- A range of standard form licences
  - From… those that abide strictly with the OSI definition
  - To… others which adopt a more commercial approach

- Some examples:
  - GPL – the Gnu General Public Licence
  - BSD – the Berkeley Software Distribution
  - MPL – Mozilla Public Licence
  - Apache, MIT, etc.

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Key risks in OS licensing

- Risk 1 - IP infringement claim
  - IP Indemnity protection (or lack thereof)
- Risk 2 - Poor performance?
  - Software warranties (or lack thereof)
- Risk 3 - Limitations on onward exploitation
  - Reciprocity (the ‘forcing restriction’)

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Risk 1 - IP Infringement

- Nature of OS development
  - Complex history with many contributors
  - Hobbyist developers may take ‘short-cuts’
- Potential for allegations of copyright infringement
- Needs to be dealt with as an additional business risk

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IBM, SCO and Linux - background

- SCO own rights in Unix operating system
- IBM licensed Unix to develop its own AIX operating system
- SCO allege that parts of Unix ‘slipped’ into Linux
- SCO claiming $5 billion in damages from IBM for:
  - Breach of contract
  - Unfair competition
  - Breach of confidentiality and trade secrets
  - Copyright infringement
- Hearing in Utah Courts set for January 2007

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IBM, SCO and Linux - the risks

- User Risk
  - Daimler Chrysler
  - AutoZone
- Current Prognosis
  - Community reaction – we can workaround
  - But what about back-royalties…

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Protecting against Infringement

- IP indemnity provisions are uncommon in standard OS Licences
- Needs to be assessed as a risk on procurement
- Purchaser could insure (or self-insure) against risk
- Some vendors sell indemnity (eg. Red Hat distribution of Linux)

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Risk 2 – Poor Performance

- Typical to exclude all warranties
- Problems with enforcing warranty exclusion in UK
  - exclusion clauses regime
- Is the risk of poor performance actually greater..?

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Risk 3 – Reciprocity (Developers Only)

- What happens if you use OS in developing your own works?
- Do you have to license derivative works on same basis?
- Main difference between Licences is treatment of derivative works
- “Reciprocity”

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OS Licence Comparison

No Reciprocity

BSD Code	+	Company Code	=	Combined Code		Keep control of own code
MPL Code	+	Company Code	=	Combined Code		
GPL Code	+	Company Code	=	Combined Code		Entire work becomes OS

'Copyleft'

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Managing risk of internal use

- Security
  - Speed to close holes?
  - Impact of popularity (e.g. Firefox versus Explorer)
- Total Cost of Ownership
  - The licence fee is only a small part
  - Need for technical, financial and legal due diligence
- Warranty – can good support offset the risk?
- IPR Indemnity
  - can one be bought?
  - consider substitutability

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Managing developer risk

- Create an internal OS policy
- Inform and educate developers
- Carry out an audit of existing use
- Then create an audit trail for future use
- Consider the impact on your company valuation
- There are successful business models:
  - Sun, IBM, Red Hat, etc.

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Summing up the risks of Open Source

- Approach to risk depends on whether you are:
  - an internal user incorporating an OS product into your system
  - a developer incorporating OS in your software

- OS Licences are still software licences…
  - the risks will vary depending on which licence is used
  - proper due diligence means an effective, up front review of the agreement

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Questions

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